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FILED
DISTRICT COURT OF GUAM

MAR 17 2006

MARY L.M. MORAN
CLERK OF COURT

DISTRICT COURT OF GUAM

TERRITORY OF GUAM

JULIE BABAUTA SANTOS, et al.,)
Petitioners,) CIVIL CASE NO. 04-00006
vs.)
FELIX A. CAMACHO, et al.,)
Respondents.)

PETITIONER SANTOS' MOTION FOR
PARTIAL RECONSIDERATION OF ORDER
STAYING PROCEEDINGS AND INVITING
MOTIONS FOR APPOINTMENT OF LEAD
COUNSEL; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT THEREOF

In its March 16, 2006 Order, the Court denied the Attorney General's Motion for Reconsideration and stayed all proceedings pending completion of an interlocutory appeal to the Ninth Circuit Court of Appeals. The Court also invited counsel from all three (3) pending cases to file motions for appointment as lead counsel. Although the Court expressed an inclination during the parties' March 15, 2006 joint hearing to have the parties enter into mediation or negotiations in efforts to settle all three (3) cases, the Court's March 16, 2006 Order does not permit immediate mediation or negotiations.

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1 The Court's consolidation of the three (3) cases for pretrial purposes results in the
2 Attorney General maintaining his role as "representative of the Government," at least in the
3 *Torres* and *Simpao* actions. All parties and counsel, therefore, remain available for immediate
4 settlement negotiations and/or mediation.

5 On March 10, 2006, the Court directed the parties to appear and discuss the possibility
6 of consolidation. The Court expressed great concerns during the March 14, 2006 hearing
7 regarding the potential for inconsistent results and waste of judicial resources. The Court also
8 expressed concerns regarding the "fairness" of one class settling without resolution of all
9 cases.

10 Petitioner Santos submits reconsideration under Local Civil Rule 7.1(i) (3) is justified. A
11 party may seek reconsideration with "a manifest showing of a failure to consider material facts
12 presented to the Court before such decision." The history of this case, the current posture of
13 all parties and counsel, and the Court's expressed intent and concerns all point to the need for
14 immediate settlement negotiations and/or mediation. The *Santos* parties have twice negotiated
15 settlements to this matter. This case proceeded to mediation last year with positive results.
16 The Court's Order, if not modified, results in substantial delay and rules out the possibility of
17 the parties and counsel working out their differences in the immediate future. The Court's
18 commencement of a battle for lead counsel is also inconsistent with a quick resolution of
19 pending matters for the benefit of class members.

20 While part of the record, the Court may have overlooked the history of this case.

21 On February 12, 2004, Petitioner brought this Class Action Petition for the recovery of
22 unpaid refundable earned income tax refunds and to compel the full implementation of the
23 Earned Income Program. This Court issued a Stipulation to Dismiss Attorney General Douglas
24

1 B. Moylan as a named defendant on March 9, 2004. On March 11, 2004, Respondents filed
2 an Opposition to the Petition, denying various allegations and setting forth numerous
3 affirmative defenses. With the consent of all parties, the Court issued an expedited Scheduling
4 Order on April 30, 2004, and held a Scheduling Conference on May 26, 2004.

5 The parties entered into a Settlement Agreement on June 14, 2004, subject to this
6 Court's approval. The parties filed Consent to the Exercise of Jurisdiction by a United States
7 Magistrate Judge on June 15, 2004.

8 On June 17, 2004, this Court held a Settlement Conference and issued a Stipulated
9 Order Granting Preliminary Approval of Class Action Settlement. The stipulated order included
10 the preliminary approval of the certification of the EIC Class. The stipulated order set a
11 deadline of August 9, 2004 for class members to provide written objections to the settlement or
12 to opt out of the EIC Class (the "Objection and Opt Out Date"). Finally, the stipulated order
13 requested this Court set a hearing for final approval of the Settlement Agreement on a date
14 approximately thirty (30) days after the Objection and Opt Out Date. On June 22, 2004, this
15 Court issued an Order scheduling the hearing on final approval of the Settlement Agreement
16 for Thursday, September 9, 2004.

17 During the Settlement Conference on June 17, 2004, a thorough discussion occurred
18 between this Court and the parties, including representatives of the Department of Revenue
19 and Taxation, regarding the Government of Guam's ability to provide the installment payments
20 required by the Settlement Agreement. Based on the financial figures discussed throughout
21 the settlement process, it is fair to conclude the government was moved to commit almost
22 every available local fund to resolve this class action.

Even if settlement had not proceeded in this class action, counsel for *Santos* was prepared early on to try this matter. Attorney Phillips successfully negotiated an expedited trial schedule with the Attorney General who at that time remained counsel of record for all Respondents. During the Scheduling Conference, Phillips informed this Court that he was prepared to file a Motion for Summary Judgment. However, soon after this Court issued the expedited scheduling order, a change in policy by the administration occurred possibly from the discovery of certain evidence, and meaningful settlement negotiations commenced resulting in the Settlement Agreement preliminarily approved by this Court.

Petitioner *Santos* asks only that the Court not hold up negotiations and mediation during the interlocutory appeal process. Furthermore, *Santos* submits that counsel in each of the three (3) cases are prepared to represent the interests of their individual clients and putative classes (where applicable). The fight over who will be "lead counsel" without a defined "global" class, and prior to good faith attempts to resolve remaining differences through negotiations and/or mediation, is not in the interest of class members. The Court can save resources by directing the parties and counsel to initiate negotiations and/or mediation immediately.

The Court's recent order setting forth a briefing schedule for the appointment of lead counsel has prompted the above motion. Petitioner submits that based on the record in *Santos v. Camacho*, proceedings related to the consolidation of *Santos* and *Simpao v. Government of Guam* and *Torres v. Government of Guam*, to include motions for the appointment of lead counsel, would likely lead to protracted and prolonged litigation, furthering the delay in resolving these cases through settlement. This Court recently ordered consolidation of these cases, despite the clear prejudice to the *Santos* Petitioners' interest in furthering the complex settlement they reached without further delay. See *International Paving*

Systems, Inc. v. Van-Tulco, Inc., 806 F. Supp. 17, 22 (E.D.N.Y. 1992) (consolidation will generally be appropriate so long as any confusion or prejudice does not outweigh efficiency concerns). Nevertheless, Petitioner does not at this time seek to challenge consolidation. Instead, Petitioner seeks only to further resolve the issues related to consolidation through mediation, rather than further litigation.

The record in this case clearly supports mediation to prevent further delays. Indeed, the record in *Santos* establishes this Court's recognition and disposition against delays due to the adversity of the interests of the parties in *Simpao* and *Torres* against the settlement interests of the Petitioners in *Santos*. The record in this case also establishes this Court's efforts from the beginning to further proceedings without undue delay. For example, shortly after the *Santos* case was filed, this Court granted an expedited trial schedule.

On August 4, 2004, this Court denied motions for intervention by applicants Christina Naputi and Charmaine Torres¹. See Santos v. Camacho, Civil Case No. 04-00006, Order, August 5, 2004. By its recent order consolidating the three cases, this Court essentially granted to Naputi and Torres more than what they even sought months ago as applicants for intervention in *Santos*. Indeed, the consolidation, and more importantly, the proceedings that will likely result, effectively nullifies the rationale and purposes of denying those applicants Intervention in *Santos*. In its Order denying intervention, this Court specifically recognized Naputi and Torres' option of filing separate suits to protect their interests in receiving 100% of the EIC funds allegedly due them:

The applicants' ability to protect their interests will not be impaired or impeded because, as noted by Petitioner Santos, their rights and interests are preserved by opting out of the settlement and/or raising these same concerns at the fairness hearing. Moreover, the

¹ Ms. Naputi, represented by Attorney Curtis Van De Veld, later filed one of the consolidated actions with co-plaintiff Mary Grace Simpao, as did Ms. Torres.

1 applicants may protect their interests by filing separate suits.
2 Intervention would not accomplish any more than their participation
3 as objectors.

4 Id. at p. 5 (citations omitted).

5 In addition, and more importantly, this Court, in denying permissive intervention, also
6 recognized intervention would merely delay the progress of the settlement reached by the
7 parties in this case to the prejudice of the settling class:

8 In the present case, the Court finds that granting these motions to
9 intervene could unduly prejudice the settling parties by
10 unnecessarily delaying the fairness hearing on the Settlement
Agreement and final disposition of this action.

11 Id. at p. 8 (citation omitted). Thus, this Court concluded in part in denying intervention:
12 "Moreover, because the prejudice to the settling class would be substantial and because the
13 applicants can be heard without granting them leave to intervene, the Court denies both
14 motions for permissive intervention." Id. at p. 9.

15 The Plaintiffs in *Simpao* also eventually entered an appearance in *Santos*. Again,
16 although granting limited appearance in *Santos*, this Court acknowledged the necessity of
17 preventing undue delay to settlement proceedings. In its Order, the Court cautioned the
18 plaintiffs and their counsel that the Court would not permit them to circumvent the Court's
19 previous denial of their motion to intervene in this case. See Santos v. Camacho, Civil Case
20 No. 04-00006, Order, September 20, 2005, p.3.

22 The Plaintiffs in *Simpao* also sought unsuccessfully to force their participation in the
23 voluntary mediation in the *Santos* case leading to the complex settlement pending before this
24 Court. See *Santos v. Camacho*, Civil Case No. 04-00006, Order, March 30, 2005 ("The
25 Movants and their counsel are obviously aware of their ability to protect their interests if they
26 believe them to be impaired as they have filed a separate suit . . . which, in their own words,

1 'embrac[es] many of the same issues' as those raised in this case.") (brackets in original).
2
3 After months of intense negotiations, the parties in *Santos* successfully completed a complex
4 settlement agreement furthering their interests in settling their claims.

5 Petitioner seeks to continue the protection of the interests of the EIC Class in furthering
6 settlement rather than protracted litigation, as it has done throughout the history of the *Santos*
7 action, with the favorable guidance of this Court.

8 Based on the foregoing, Petitioner Santos requests this Court's reconsideration in
9 establishing a briefing schedule for the appointment of lead counsel. Petitioner further
10 respectfully requests an order to all parties in the consolidated action above, to enter mediation
11 to resolve all issues related to consolidation, to include the complex issue of class definition.
12

13 In the Alternative, should this Court determine a substantial need for "lead counsel" at
14 this point, Petitioner Santos requests this Court designate Mr. Phillips as interim counsel for
15 the EIC Class pursuant to Rule 23(g)(2)(A), pending the outcome of the Attorney General's
16 interlocutory appeal to the Ninth Circuit. As reviewed above, the Court has previously
17 appointed Phillips as interim counsel, resulting in negotiations, mediation, and two settlements.
18

Respectfully submitted this 17th day of March, 2006.

PHILLIPS & BORDALLO, P.C.
Attorneys for Petitioner Santos

22 By: _____
23 Michael F. Phillips
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